

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

VERSUS TECHNOLOGY, INC.,)
)
Plaintiff,)
)
v.) **Civil Action No. 04-1231 (SLR)**
)
RADIANCE, INC.,)
)
Defendant.)
)

**VERSUS'S MOTION TO STRIKE RADIANCE REPLY BRIEF
OR FOR LEAVE TO FILE A SURREPLY**

Plaintiff Versus Technology, Inc. (“Versus”) moves the Court to strike the Reply (D.I. 94) filed by Defendant Radianse, Inc. (“Radianse”) in association with its consolidated motion to dismiss, for lack of standing, Versus’s infringement claims with respect to U.S. Patents 5,572,195 (“195 patent”) and RE 36,791 (“791 patent”). (D.I. 78). In the alternative, Versus moves the Court for leave to file a surreply.

Contrary to Local Rule 7.1.3(c)(2), Section A of the Radianse’s Reply (D.I. 94) includes material that could have and should have been included in the opening brief (D.I. 79) to Radianse’s consolidated motion. (D.I. 78). Radianse attempts to use the July 6, 2005 deposition of, and document production by, the inventor and president of the licensor of the patents at issue, Alan C. Heller (“Heller”), as an excuse to advance a new argument in the final stage of briefing.¹ The new argument raised in the Radianse Reply is improper and should be struck.

¹ Radianse argues that a negative inference should be drawn from a settlement agreement between Heller and Versus. Radianse's settlement theory is not only wrong, it is improper because the settlement documents were produced to Radianse on April 29, 2005, well before Radianse filed any of its motions to dismiss. (*See e.g.*, Exhibits B, C, D and H to Radianse's Reply). The Heller deposition provides no additional insight into the meaning of these documents.

After previously filing separate motions (D.I. 55 and 74 (withdrawn)), Radianse submitted, on June 24, 2005, a consolidated motion to dismiss two of the four patents in suit, arguing that Versus lacks standing to sue Radianse for infringement despite Versus's possession of an exclusive license to these two patents. (D.I. 78). None of Radianse's prior motions or associated briefs, nor Versus's opposition briefs, raised the settlement agreement now argued by Radianse in its recent Reply as a basis to narrowly construe Versus's exclusive rights.

Additionally, in sections A and B of its Reply, Radianse mischaracterizes Mr. Heller's testimony and misconstrues the exclusive license in light of Mr. Heller's testimony. Radianse had the intention to take Mr. Heller's deposition well before it filed its consolidated motion. If Radianse wanted to use Mr. Heller's testimony to support its motion, Radianse should have waited to file it until after the deposition. Radianse cannot be permitted to sneak its characterization of Mr. Heller's testimony into a new argument of a final and unanswerable brief.

In view of the foregoing, Versus respectfully requests that the Court strike sections A and B of Radianse's Reply, or in the alternative, grant Versus leave to file the surreply, attached hereto as Exhibit 1.

Respectfully Submitted,

DATED: July 21, 2005

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UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2005, I electronically filed this VERSUS'S MOTION TO STRIKE RADIANCE REPLY BRIEF OR FOR LEAVE TO FILE A SURREPLY with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to the following, who is also **SERVED BY HAND** on this date:

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